

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A

JUDGE, No. 04-239,

JUDGE RICHARD H. ALBRITTON, JR.

Florida Supreme Court

Case No. SC05-851

MEMORANDUM IN OPPOSITION
TO MOTION FOR ATTORNEY'S FEES

COMES NOW the undersigned, as Special Counsel to the Judicial Qualifications Commission ("JQC") and responds to Honorable Richard H. Albritton, Jr.'s motion for attorney's fees as follows:

I. INTRODUCTION.

A. Summary

On January 31, 2006, Respondent's counsel, Scott K. Tozian, Esquire, filed a Motion to Award Attorney's Fees pursuant to section 57.105(3), Florida Statutes. Judge Albritton's Motion is wholly without merit and should be denied summarily. The Supreme Court has squarely held that "[s]ection 57.105 sanctions apply only to civil proceedings." *Inquiry Concerning a Judge, Charles W. Cope*, 848 So.2d 301, 305 (Fla. 2003). Contrary to the arguments advanced by Judge Albritton in his Motion, even if 57.105 sanctions were applicable in JQC proceedings, the JQC has consistently made every effort to move this matter forward with the minimum of delay and with the utmost courtesy. The JQC withheld the production of a very limited set of documents requested by Judge Albritton's counsel based entirely upon a good faith assertion of privilege and adherence to the applicable discovery rules. In his Motion Judge

Albritton argues that he is entitled to certain materials under Rule 12(b). However, as more fully outlined in the JQC's Memorandum in Opposition to Respondent's Motion to Compel, Judge Albritton's argument is incorrect and on January 26, 2006, Judge Wolf agreed with the JQC's position and denied Judge Albritton's Motion. Therefore, it is incomprehensible that the JQC, as the prevailing party, should be required to pay the other party's attorney's fees. Finally, Judge Albritton's motion fails to comply with the procedural requirements of section 57.105. Judge Albritton's Motion for Attorney's Fees should be denied.

II. STATEMENT OF RELEVANT FACTS¹

The JQC filed its Notice of Formal Charges in this matter on May 19, 2005. Within one week, the JQC's Special Counsel ("Special Counsel") began responding to discovery requests from Judge Albritton's original counsel. In early June, 2005, Special Counsel also verbally asked for deposition dates for Judge Albritton from his initial counsel, Mr. Harper. Mr. Harper advised that he was going on vacation and that he would provide deposition dates on his return. In a letter dated June 29, 2005, Special Counsel requested Petitioner's counsel to inform him of available dates to schedule Judge Albritton's deposition. There was no response to this request and shortly after the June 29th letter was sent, Judge Albritton retained new counsel to represent him in this cause.

Judge Albritton's new counsel requested an additional extension of time to respond to the Notice of Formal Charges and Special Counsel advised that he had no objection. The new counsel, Mr. Tozian, then requested and received additional extensions to respond to the Formal Charges, which he did on July 25, 2005. In a letter dated August 19, 2005, Special Counsel again responded to Judge Albritton's new counsel's discovery requests by reproducing

¹ All of the facts contained in this section are verified in the accompanying Affidavit of Special Counsel David T. Knight.

documents previously disclosed to Petitioner's former counsel. At the same time, Special Counsel, for a third time, repeated the request to depose Judge Albritton at dates of his convenience in September. Again, on September 1, 2005, Special Counsel asked for a fourth time to arrange a deposition date for Judge Albritton.

On September 6, 2005, the JQC issued an Amended Notice of Formal Charges. In late September, 2005, Judge Albritton's counsel, in response to the fifth request from the JQC to depose the Petitioner, for the **first time** advised Special Counsel that Judge Albritton would be unwilling to agree to dates for the deposition prior to the JQC producing certain privileged materials prepared by the JQC in the course of its investigation of Judge Albritton. Having exhausted efforts to informally arrange for Judge Albritton's deposition without acceding to his demands for the production of privileged materials, in November, 2005, both parties filed motions to compel, with the JQC asking that Judge Albritton be required to sit for a deposition and the Judge asking for the production of privileged materials.²

In spite of Judge Albritton's unwillingness to submit to a deposition, the JQC has been willing to allow him to proceed with taking any deposition he wishes. The Judge has already completed two depositions, and has advised that many more are planned. At no time has the JQC failed to timely provide documents provided by Rule 12(b) – over 300 pages to date – or failed to promptly cooperate with the Judge's wish to take depositions. The one, and only, discovery dispute between the parties has related to Judge Albritton's refusal to sit for depositions unless privileged materials were first provided to him.

On January 26, 2006, Judge Wolf announced his ruling on the pending motions, granting the JQC's motion and denying Judge Albritton's motion. Once again, the JQC tried to obtain

² The partisan rhetoric from Judge Albritton has been an unfortunate distraction from the parties' efforts to obtain a ruling on the controlling legal issue. It is apparent that the Motion to Award of Attorney's Fees is the next step in this process.

dates for Judge Albritton's deposition shortly following the ruling, and once again he has refused to appear. Strangely, in the Judge's motion to award attorney's fees, he asserts that the JQC, and its Special Counsel, are the ones who have engaged in conduct "taken primarily for the purpose of unreasonable delay."

III. ARGUMENT

It is well settled under Florida Law that attorney's fees are not recoverable in the absence of a statute or contractual provision authorizing their recovery. *Price v. Tyler*, 890 So.2d 246, 250 (Fla. 2004). Judge Albritton's Motion to award Attorney's Fees should be denied because no statute provides for the recovery of fees in proceedings before the Judicial Qualifications Commission. Florida Statutes § 57.105(3), upon which Judge Albritton's motion relies, provides that a court shall award damages for unreasonable delay only "in any civil proceeding or action" and makes no mention of JQC proceedings. As the Florida Supreme Court held in *Inquiry Concerning a Judge, Charles W. Cope*, "[s]ection 57.105 sanctions apply only to civil proceedings." 848 So.2d at 305. Section 57.105 clearly does not apply to Judicial Qualifications Commission proceedings and the *Cope* court noted that, "[w]e have never applied [57.105] to proceedings before the JQC, or to any other administrative proceedings for that matter." *Id.* For this reason alone, Judge Albritton's motion must be denied.

Even if Section 57.105(3) authorized the recovery of attorney's fees in JQC proceedings, Judge Albritton's Motion to Award Attorney's fees should be denied because Special Counsel refused to produce the documents requested by Judge Albritton, in good faith and not for the purpose of unreasonable delay. The JQC, as it is permitted, has withheld a very limited category of requested material to protect the integrity of its investigatory process, the privacy expectations

of the individuals interviewed by the JQC's investigator,³ and because the information requested by Judge Albritton is protected by the well established work product privilege. Judge Wolf's denial of Judge Albritton's Motion to Compel clearly vindicates the legitimacy of the JQC's position and illustrates the spurious nature of Judge Albritton's pending motion.⁴

Judge Albritton has produced no evidence that the JQC refused to produce the requested documents for the purpose of unreasonable delay. Judge Albritton's various counsel have twice requested that Special Counsel produce materials pursuant to Florida Judicial Qualifications Commission Rule 12(b). On both occasions, Special Counsel promptly furnished Judge Albritton with all the material to which he was entitled under Rule 12(b). Indeed, Judge Albritton is incapable of showing how the JQC's refusal to produce the requested materials has resulted in any delay whatsoever, as Judge Albritton has been free to conduct additional discovery at any time and has done so by taking several depositions with more depositions scheduled. The JQC has made every effort to move this matter forward but has found its efforts repeatedly blocked by Judge Albritton. If any party is guilty of causing these proceedings to be delayed, it is Judge Albritton.

Finally, Judge Albritton failed to comply with the procedural requirement that are a condition precedent to the filing of a Motion for Attorney's fees pursuant to § 57.105. Florida Statutes § 57.105(4) requires that a motion seeking sanctions must "be served **but not filed** with or presented to the court unless, within 21 days after service of the motion the challenged [pleading] is not withdrawn or appropriately corrected." (emphasis added). Judge Albritton filed his Motion to Award Attorney's Fees the same day it was served on the JQC's Special Counsel,

³ As indicated in the affidavit of the JQC's investigator, Robert W. Butler, all witnesses were assured that the interviews were completely confidential.

⁴ The merits of the controlling legal issue are argued more fully in the JQC's Memorandum of law in Response to Judge Albritton's Motion to Compel, filed previously before Judge Wolf.

without waiting the 21 days required by the statute. Consequently, for a third and independent reason, Judge Albritton's motion should be denied for failing to comply with the procedural requirements of § 57.105.

IV. CONCLUSION

For the foregoing reasons, Judge Albritton's motion should be denied.

Respectfully Submitted,

David T. Knight, Esquire
Florida Bar No.: 181830
Brian L. Josias, Esquire
Florida Bar No.: 893811
HILL, WARD & HENDERSON, P.A.
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900 (Telephone)
(813) 221-2900 (Facsimile)

Special Counsel for the Florida Judicial
Qualifications Commission

and

Thomas C. MacDonald, Jr., Esquire
Florida Bar No. 049318
1904 Holly Lane
Tampa, Florida 33629
(813) 254-9871 (Telephone)
(813) 258-6265 (Facsimile)

General Counsel for the Florida Judicial
Qualifications Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this ____ day of February, 2006 to:

Scott K. Tozian, Esquire
Smith, Tozian & Hinkle, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602
Attorney for Judge Albritton

John Beranek
Counsel to the Hearing Panel
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302

Brooke Kennerly
Florida Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee, Florida 32303

Judge James R. Wolf,
Chairman, Hearing Panel
Florida Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee, Florida 32303

Thomas C. MacDonald, Jr., Esquire
1904 Holly Lane
Tampa, Florida 33629

DAVID T. KNIGHT

Special Counsel

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INQUIRY CONCERNING A
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JUDGE RICHARD H. ALBRITTON, JR.

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_____/

AFFIDAVIT OF DAVID T. KNIGHT

1. My name is David T. Knight, and I:

- a. am 57 years old;
- b. have been a member in good standing of the Florida Bar since 1974;
- c. have served as Special Counsel to the Judicial Qualifications Commission (“JQC”) in this matter; and
- d. have personal knowledge of all matters set forth below.

2. In my capacity as Special Counsel, on May 19, 2005, I filed the Formal Charges, and Amended Formal Charges against Judge Albritton in this proceeding.

3. On May 25, 2005, I began responding to discovery requests from Judge Albritton’s initial counsel, Harry Harper (“Harper”), pursuant to Rule 12(b) of the Rules of the Judicial Qualifications Commission (“JQC Rule”).

4. In early June, 2005, I contacted Harper by telephone and asked for dates when I could schedule the deposition of Judge Albritton. I was informed that Harper was going on an extended vacation and would respond to my request when he returned. Harper also asked for a 30 day extension to respond to the Formal Charges, which I agreed to. On June 8, 2005, Judge Wolf granted the extension, giving Judge Albritton until July 5, 2005, to respond. *See Exhibit 1.*

5. On June 29, 2005, after I understood Harper had returned from vacation, I wrote him a letter asking a **second** time for times to schedule Judge Albritton's deposition and offered to schedule depositions that Harper might want to take. *See Exhibit 2*. No response to this letter was received.

6. In early July, 2005, I was informed that Scott Tozian ("Tozian") was being substituted as counsel for Judge Albritton. Tozian requested another extension of time to respond to the Formal Charges, and I agreed. Tozian finally filed the response to the Formal Charges on July 25, 2005, seeking to dismiss them.

7. On August 19, 2005, I asked a **third** time for dates to take Judge Albritton's deposition. *See Exhibit 3*. No response to this letter was made.

8. On September 1, 2005, I asked a **fourth** time for dates to take Judge Albritton's deposition. *See Exhibit 4*. At or about this time, I was told by Tozian that he did not want to schedule the deposition until after the motion to dismiss the Formal Charges had been decided. On September 6, 2005, in response to an order from Judge Wolf, Amended Formal Charges were filed.

9. On September 26, 2005, I called Tozian and asked a **fifth** time for deposition dates for Judge Albritton and for the first time was told that Judge Albritton refused to have deposition taken until the JQC produced privileged witness summaries. *See Exhibit 5*.

10. Following the receipt of Exhibit 5, Tozian and I "agreed to disagree" about Judge Albritton's right to receive the privileged summaries. It was agreed between us that we would each file a motion to compel discovery, and present this issue to the JQC. In November, 2005 both sides filed their respective motions to compel. In an unfortunate distraction to the resolution of the controlling issues, Judge Albritton has engaged in emotional partisan rhetoric

accusing the JQC of trying to “trick” him and intending to generate “bad publicity” for him. *See Exhibit 6* from Tozian, and my response, **Exhibit 7**.

11. In another effort to “move” discovery in this case, I wrote Tozian on January 10, 2006, wishing to both coordinate scheduling depositions he wanted to take, and to also try on yet a **sixth** occasion to schedule Judge Albritton’s deposition. *See Exhibit 8*.

12. On January 26, 2006, Judge Wolf issued his ruling on the pending motions to compel, denying Judge Albritton’s motion and granting the motion of the JQC. Shortly following the ruling, I asked Tozian for the **seventh** time for deposition dates for Judge Albritton. *See Exhibit 9*. Rather than provide dates, he filed the current set of motions – to stay, for attorneys’ fees, and to review Judge Wolf’s Order.

13. During the pendency of this proceeding, I have promptly responded to any discovery requests made by Judge Albritton. I have produced **twice** – once to each of his successive attorneys – over 300 pages of documents, and I have always promptly responded to his efforts to schedule depositions. In spite of the fact that Judge Albritton has refused to allow his deposition to be taken, the JQC has advised counsel for Judge Albritton that it would not oppose, and, in fact, would cooperate to schedule any depositions the Judge wanted to take. The Judge has taken full advantage of this offer, having already taken several depositions, and indicated that many more are planned.

14. Further affiant sayeth not.

DAVID T. KNIGHT

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned authority, personally appeared David T. Knight, who is personally known to me, and who did take an oath that the foregoing is true and correct.

Dated this _____ day of February, 2006.

NOTARY PUBLIC

Print Name: _____

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